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STATE OF WASHINGTON

BY h COURT OF APPEALS, DIVISION II
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STATE FARM FIRE AND CASUALTY COMPANY,

Intervenor/Appellant,

v.

ROBEERT CHARLES JUSTUS; CORINNE M. TOBECK, ESTATE OF
JOSEPH "JOEY" TOBECK; VERNON A. TOBECK AND APRIL D.

NORMAN

Plaintiffs/Respondents

v.

WILLIAM D. MORGAN and DONNA MORGAN,
Defendants/Respondents

ROBERT CHARLES JUSTUS CORINNE M. TOBECK, ESTATE OF
JOSEPH "JOEY" TOBECK; VERNON A. TOBECK AND APRIL D.

NORMAN

RESPONSIVE BRIEF

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I. Introduction

Appellant appeals a reasonableness determination by the trial court. In a reasonableness determination hearing the courts' role is singular. It is to determine the reasonable value of the settlements between the Morgans and Plaintiffs, Justus and Tobeck. It is the court's role to find a reasonable settlement amount, not just an up or down on their numbers. (CP 853-855). The court critically scrutinized the stipulated covenant judgment by applying the nine criteria set forth in Glover vs. Tacoma General Hospital and Chaussee vs. Maryland Casualty Company, et al., as required in all settlements. (CP 754). These total nine separate factors for consideration by the court and these are unweighted factors. *Id.* After considering these factors the Trial Judge determined that Justus has a viable legal theory based in negligence and determined that: However, negligence-based causes of action have a three year-year statute of limitations and are not time barred here. (CP 759-760).

On October 16, 2014 the court heard argument of Counsel and in conjunction with those arguments reviewed the following document. (CP 227-263,751-752). State Farm did not conduct any discovery, call lay or expert witnesses to defend against the reasonableness amount that the court would determine. (CP 778-745).

In May 2014 the insured (Morgans) entered into a stipulated judgment and settlement release agreement with Mr. Justus because the Morgans believe that they have been severely prejudiced by failure of State Farm to accept coverage of the claims made by Robert Charles Justus (Justus). (CP 185-187). The record shows and the court determined that they (the Morgans) have little or no ability to pay any judgment. It seems agreed by all parties that even a modest judgment would bankrupt the Morgans. (CP 761). The Court noted that as a described fully in our Supreme Court in Besel vs. Viking Insurance Company, the entire purpose of a reasonableness hearing is to avoid collusive settlements. (CP 761). Since the agreement to

settle between the Morgans and each Plaintiff specifies an agreed upon settlement amount but includes language allowing settlement in whatever amount the Court deems reasonable, the potential for any bad faith or fraudulent settlement is virtually eliminated. (CP 761-762).

State Farm's analysis of the settlement process overlooks on central feature, that State Farm denied indemnity coverage for the Morgans leaving them to sift for themselves through the perilous sands of personal liability. So the Morgans bought their peace. (CP 762). In the form of a consent judgment. The Morgans did what they had to do in order to extricate themselves from a likely bankrupting judgment. (CP 761). In return for a covenant from the Plaintiff (Justus) not to execute against the Morgans personally, the Morgans assigned its first-party insured rights against Intervenor State Farm to Mr. Justus. (CP 185-187, 753).

After the courts' extensive analysis of the *Chaussee* factors and prior to its ruling, it was the courts'

understanding that settlement agreement could be modified by the court to conform to what the court finds to be reasonable. (CP 185-197, 753). All three attorneys, Mr. Lane, Attorney to the Estate of Tobeck, Kevin Johnson, Attorney for Mr. Justus, and Ms. DeYoung, counsel for Intervenor State Farm, confirmed with the amount the Court does find to be reasonable in this action in the event the proposed amount is not found to be unreasonable. (CP 753). The court found \$818,900 reasonable. (CP 768).

II. STATEMENT OF THE ISSUES

A. Appellant argued that the trial court erred because the court entered the January 5, 2015 Order on Reasonableness. (CP 776-807) In response, the trial court did not error because State Farm/Appellant agreed to the courts determination of reasonableness. (CP 753, 785), and had an opportunity to conduct discovery and present evidence but chose not to do so. (CP 844-942).

B. Appellant argues that the trial court erred because the court premised its conclusion that Justus' claim had

merit on a negligence theory, where all evidence before the court established that Mr. Morgan's conduct toward Mr. Justus involved solely intentional conduct and intentional tort claims were time barred. (CP 786-788, 791-792). In response, the court considered Mr. Morgan's conduct and determined that a negligence based causes of action have a three year statute of limitations and are not time barred here. (CP 759-760, 791, 792).

C. Appellant argues that the trial court erred because it premised its ruling on that State Farm denied indemnity coverage to the Morgans, where no facts before the court supported that conclusion. (CP 794). In response, Appellant did deny indemnity coverage because the Morgans believe that they have been severely prejudiced by failure of State Farm to accept coverage of the claims made by Robert Charles Justus (Justus). (CP 185-187). Morgans entered into the consent judgment and release with Justus because even a modest judgment would have bankrupted the Morgans. (CP 761, 793). So the Morgans bought

their peace. (CP 762, 794).

III. STATEMENT OF THE CASE FACTS

A. Nature of the Case

On June 9, 2010, Joey Tobeck (Tobeck) wanted to go with Robert Justus (Justus) to look for a car that Mr. Justus was considering purchasing. (CP 859-860). During the trip, Tobeck proceeded to call Justus spoiled because he was looking at a car that has a value over five grand. (CP-860) Justus told Tobeck that he grew in a trailer just like he did; that he was not a spoiled rich kid. So Justus said "Hey, I grew up right down the road from here. (CP-860). So Justus and Tobeck proceeded to go down and look at his old house and skip rocks down by the river and hang out. (CP-860). Tobeck is always looking for scrap metal whether it is in a ditch somewhere instead of rotted in a ditch or somewhere. (CP 861). Tobeck collected scrap metal. His father instilled that in his boys. (CP 858). As the two were driving slowly down the road, Tobeck saw the metal

covered in brier and sticker bushes and wanted to put it in the back of Justus' car. Justus told Tobeck that it would not fit. (CP-861-862). So Tobeck and Justus went back to Tobeck's parents' house to pick up his father's green Chevy truck and returned to the area. (CP-862, 863). The 77 Sheyenne Chey was very loud. (CP 864). Tobeck and Justus went down the road and located the pipe in a "ditch" on the opposite side of the roadway. (CP 170, 862). The scrap pipes were not on Morgan's property located at 358th Street South, Roy, Washington, inside Pierce County. They pulled off the side of the road in the dirt or in grass, and Tobeck and Justus put the pipe in the back of the truck. (CP 863). It took forever. *Id.* The pipes were heavy and the truck doesn't have a tailgate, so Justus and Tobeck had to make a tailgate out of rope. (CP-864), because, leaving this road, there's a pretty steep incline and they were afraid the pipes would slide out of the truck. (CP 865). The junk price for the pipes was \$200.00. (CP 203). Justus and

Tobeck could persuasively claim, under these facts, that they were simply taking abandoned property. (CP 757). There were no “no trespassing” signs. Justus used to live there for years. So he didn’t feel—even if there may have been a trespassing sign up in some tree, Justus did not feel that he was trespassing because Justus use to live there. (CP 849-850).

Mrs. Morgan hears some loud noises outside and told William Morgan. (CP 141, 427-428,460). William Morgan, who was inside his home in the living room watching television and listening through his headphones did not hear the noise but grabbed his gun and went outside to investigate. (CP 200, 429-430).

Justus heard someone say “Hey, hey.” Justus looked to the right to were the sound was coming from, and he saw a silhouette of a person with a handgun pointed at him. (CP 200, 866). Morgan told his wife to call the police. (CP 202). Justus testified that he instantly took his hood off. He was telling Morgan that he

is a father. He has a son. He indicated that he lived up there on this hill. He meant no harm. Morgan didn't reciprocate on a human level of communication with Justus at all. Morgan said F-you! (CP-866). Every time Justus tried to explain to Morgan who he was and that we're kids; we are not on a malicious act at all. He also indicated that they would take the pipes out of the back of the truck and to call the cops. Put the gun down please." (CP 866). Justus testified that Morgan wasn't--again reciprocating at all... (CP-867). Tobeck said "F this guy," Justus said "but Morgan had the gun pointed at me, Joe." Joe was on the other side of the truck. (CP-867). Justus lifted his hands up and reaching back of the door and telling Morgan this whole time that we just don't want to be pointed at his gun. We are getting in our truck. (CP-867). Tobeck and Justus got into the truck and proceed to a dead-end cul-de-sac. (CP-868). Before all four tires got on the concrete, there were gunshots. (CP-868). Mr. Morgan

began to shoot at the moving truck as the truck was moving away from Mr. Morgan to the dead end. (CP 72,338,435, 868).

Justus testified that there was a moment in time when he was in the truck where he felt like someone had thrown a water balloon at him. Justus thought what the heck. He looked down at himself and he had red dots all over him. He had Joey's blood all over him. (CP 869).

The truck started bouncing up and down violently: bam, bam, bam, bam. Justus looked up and all he sees is a big ol' tree. (CP 870). The truck hit the tree and started screaming. Justus looked over at Tobeck and he was grasping for air. Justus told Tobeck to get out of the truck. (CP 870-871). Justus remembered that Tobeck was not getting out of this truck with him. (CP 871). Justus tried to open the door but it was jammed. So Justus crawled out of the window and Mr. Morgan confronted Justus again with the pistol right to his face. Morgan instructed Justus to get on his stomach and put

his hand and legs up. Justus told Morgan “you just killed my best friend.” (CP 871). Morgan responded F-you. You just saw what I did to your friend. Don’t move, don’t move. (CP-872). To Justus the worst part about all of that is that he had to lay there on his stomach like a piece of trash while his best friend is gurgling for someone to at least act like they gave a shit. He had to lay there for a half an hour until the cops—waiting for the cops to show up. (CP-872, 439). Mr. Justus suffered severe post-traumatic stress disorder (PTSD) as a result of the events of June 9, 2010. (CP 764-769). When the police arrived they found no weapons on Justus. They did find a pistol on Mr. Morgan concealed in his back pocket. (CP 269-275)

On June 27th 2012 Mr. Justus filed a lawsuit against the Morgans, *Justus v. Morgan*, Pierce County Superior Court cause number 12-2-10340-8. Well within the three year statute of limitations for a negligence base claim. (CP 21-28).

After the court heard his evidence it determined that:
“It’s clear to the Court that William Morgan is wholly responsible for the death of Joseph Tobeck and the damages sustained by Mr. Justus. Mr. Morgan left his home with a firearm for which he had no concealed weapons permit. (CP 754).

B. The trial Judge addressed every Chaussee factor.

Appellant is arguing that it is challenging the trial courts irreconcilable conclusion that the facts support imposition of liability on a negligence theory. That the viability claim for unlawful detention presents a recognized cause of action in Washington and that the claim is not time barred.

Mr. Justus’ lawsuit was resolved before trial by a stipulated consent judgment and settlement with the Morgans in the amount of \$1.3 million with a covenant not to execute against the Morgans. In exchange, the Morgans assigned to Justus all first party claims the Morgans have against State Farm and Casualty Company. (CP 185-194).

Mr. Justus filed a motion to determine the reasonableness of the settlement. (CP 34-166). State Farm participated as an intervener in that litigation. (CP 34-166). All parties agreed that whatever the court determined to be reasonable was acceptable. (CP 753).

State Farm urged the court to find that Defendant Morgan's proposed settlement with each Plaintiff was collusive, was entered in bad faith, and was fraudulent. (CP 761). The court cited *Besel vs. Viking Insurance Company*, noting that the entire purpose of a reasonableness hearing is to avoid collusive settlements. (CP 761). The court further noted that, in particular, since the agreement to settle between the Morgans and each Plaintiff specifies in whatever amount the Court deems reasonable, the potential for any bad faith or fraudulent settlement is virtually eliminated. (CP 761). In light of the Plaintiffs and Defendant Morgans empowering the Court to establish a reasonable amount of the settlement if their proposal is thought by the Court to be unreasonable. *Id.* All parties

agreed. (CP 753). The Court determined that \$818,900 was reasonable. (CP 768).

IV. RESPONSE TO STATE FARMS' ARGUMENTS

A. Standard of Review

The trial courts' finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 922, 169 P.3d 1 (2007). Here, the trial court's finding of reasonableness was supported by substantial evidence. (CP 749, 775, 844-942). Therefore, should not be disturbed.

A de novo standard applies when there are no factual disputes and the basis of the trial court's decision is a purely a question of law. This is a legal question; therefore, the standard of review is de novo. *Barr v. Day*, 124 Wash.2d 318, 324, 879 P.2d 912 (1994).

State Farm argued that Justus' claim is time barred because the complaint was filed two years and 18 days following the occurrence. (CP 759-760). The court ruled

that this is true for intentional torts. However, negligent based causes of action have a three-year statute of limitation and are not time barred here. (CP 759-760).

B. State Farm argued that the settlement amount is somehow collusive.

At the reasonableness hearing, Appellant/State Farm urged the trial Court to find that Defendants Morgan's proposed settlement with each plaintiff was collusive, was entered into in bad faith and fraudulent. (CP 761-762). In its opening brief State Farm argues that the Settlement and Consent Judgments are inherently suspect because a covenant not to execute raises the specter of collusive or fraudulent settlements. *Pg. 8*. There is no merit to State Farms' arguments because the amount that was determined to be reasonable was not determined by the parties to the covenant judgment, but was determined by the trial judge specifically to deflate any concern of collusion. (CP 762-764). The court found no collusion, fraud, or bad faith in the method by which the settlement was reached, again in light of the

Plaintiffs and Defendant Morgan empowering the court to establish a reasonable amount of the settlement if their proposal is thought by the court to be unreasonable. (CP 762).

In support of his damage claim Mr. Justus presented testimony of Gloria Roettger, clinical psychologist who had extensive involvement with Mr. Justus and Dr. Mark Whitehill, a Ph.D Forensic psychologist who evaluated him in January of 2014. (CP 227-263, 765-769). The factual findings and damages the court determined to be reasonable was supported by substantial evidence and should not be disturbed on appeal. (CP 765-769). The court considered Appellant's expert Dr. Vadenbelt who referred to addiction history is playing a current role in Mr. Justus' level of psychological functioning. (CP 765-769). But concluded that there is no meaningful conduct on the part of Mr. Tobeck and Mr. Justus that contributed to his tragedy. (CP 767).

C. Justus has a meritorious liability theory that is not time barred.

Appellant is challenging the courts determination of two of the nine *Chaussee factors*: 1) Justus' liability theory; 2) Merits of the Morgan's defense theory. In response to #1, the substantial evidence in the record clearly supports a negligence theory. Here, the court found that Morgan was in error in his assessment that the Plaintiffs were trespassers, at least as to Mr. Morgan and hence, his affirmative defense fails. (CP 757). Here, Morgan *at the initial contact* with Justus and Tobeck instructed his wife to call the police. (CP 202). The police were called and in route. (CP 755). Morgan poses a legal defense that he was making a civil arrest for a crime being committed in his presence. (CP 756). Under Washington law, a private person may arrest another for a misdemeanor if: (1) was committed in the citizens' presence and (2) constitutes a breach of the peace. *State v. Gonzales*, 24 Wn. App.437, 439, 604 P.2d 168 (1979); *Guijosa v. Wal-Mart Stores*, 101

Wn. App 777, 791, 6 P.3d 583 (2000). There was no evidence that there was any breach of the peace by Justus and Tobeck. (CP 757). The peace was only breached when Mr. Morgan arrived in the street with his loaded hand gun. (CP 757). To accomplish the citizen's arrest Morgan initially confronted Justus and Tobeck at gunpoint (CP 754-755). Morgan left his property and detained Justus until the police arrived. (CP 755). Morgan kept Justus on the ground at gunpoint and from attending to Mr. Tobeck's mortal wounds. (CP 755). Here, Morgan was in error in his assessment of the situation that the Plaintiffs were trespassers at least as it relates to Mr. Morgan, hence this affirmative defense fails. (CP 757). Every individual is empowered to arrest wrongdoers in certain circumstances, but individuals looking to make a citizens' arrest act at their own risk. Not only is the act of apprehending a person inherently dangerous, but failure to meet the legal requirements for a citizens' arrest could have devastating consequences (both civil and criminal) for the person

making the arrest. Here, Mr. Morgan made a serious error in judgment which created the wrongful detention of Mr. Justus. There is substantial evidence in the record that Mr. Justus suffered damages as a proximate cause of Morgan's error in judgment. (CP 748 775).

Negligence is conduct. It has been defined as doing some act that a reasonably careful prudent person would do under the same or similar circumstances, or failing to do something that a reasonably careful person would have done under the same or similar circumstances. *Restatement (second) Torts* §§ 283, 292, 298, 299. It may also exist where the actor has considered the possible consequences and has exercised his own judgment. *Id.* Here, the overwhelming evidence in the record show that Mr. Morgan was in error in his assessment that the Plaintiffs were trespassers. (CP 757) Mr. Morgan exercised his own judgment in error, in his belief that he had authority to conduct a citizens' arrest and detain Justus and Tobeck. He did not. As a consequence, Morgan was

negligent in his judgment on June 9, 2010.

Additionally, the first paragraph of the passage State Farm quoted of the trial court decision sounds in negligence. The court indicated that: "It is clear that Mr. Morgans is wholly responsible for the death to Joseph Tobeck and the damages sustained by Mr. Justus. Mr. Morgan left the safety of his home and with a firearm for which he had no concealed weapons permit". (CP 754). A statute or regulation which by its terms creates a duty to individuals can be the basis for a negligence action. For example, requiring a permit to carry a concealed weapon. RCW 9.41.050 (1)(a), Except in the person's place of abode or fixed place of business, a person shall not carry a pistol concealed on his or her person without a license to carry a concealed pistol. Here, Morgan was in the roadway not on his property when the police officer retrieved the hand gun from Morgan's rear pocket of his bib overalls. (CP 269-275). Morgan's conduct is negligence per se when a statute or ordinance is violated,

and that law is designed to (a) protect a class of persons which includes the person whose interest is invaded, (b) protect the particular interest which is invaded, (c) protect against the kind of harm which resulted, and (d) protect that interest against the particular hazard from which the harm results. *Young v. Caravan Corp.*, 99 Wash.2d 655, 659-60, 663 P.2d 834, 672 P.2d 1267 (1983). This statute is specifically designed to protect people like Justus and Tobeck from being wrongfully detained at gunpoint by Morgan. Here, the court found that Justus was confronted by an angry and aggressive armed Mr. Morgan. (CP 754-755). While Justus apologized profusely for any intrusion and offered to restore the conduit pipe which was not even located on Mr. Morgan's property to its original location. CP 754-755). Justus and Tobeck had a right to be on a road picking up what they thought was abandoned property. (CP 757). The harm the statute is sought to protect against is exactly what happened in this case.

The hazard is an armed upset old man that would not listen to reason, used his voice and gun to detain two young men because his judgment/assessment of the situation was in error. (CP 757). Despite the fact that Morgan's left his property with a concealed weapon his conduct was certainly consistent with a negligent based theory of liability because Mr. Morgan was so angry that he was beyond the point of self-control and reason. Morgan violated Washington state law by concealing his weapon and as a proximate cause Mr. Justus suffered damages. (CP 880, 940).

1. State Farm next argues that the tort of wrongful detention is substantially the same as false imprisonment and false arrest.

In response, Justus never plead those claims in his complaint. (CP 21-28). Here, Justus suffered personal injury because of the wrongful detention of a person subject to a three year statute of limitation because it is "not enumerated" under the statutes of the state of Washington. Under RCW 4.16.080(2), an action for taking,

detaining, or injuring personal property including and action for the specific recovery thereof, *or for any other injury to the person or right of another not hereinafter enumerated, the statute of limitation is three years.* Wrongful detention of a person is not hereinafter enumerated under RCW 4.16.080, but is recognized in the State of Washington under the catch all phase, "or for any other injury" for Morgans error in judgment in detaining Justus to recover property that was not stored on his property. Justus filed his claim on June 9, 2013, well within the three year statute of limitations.

2. Next Appellant argues that Mr. Justus has no viable claim for false arrest for false imprisonment because these claims are time barred.

The court determined that Morgan was in error in his assessment that the plaintiffs were trespassers, at least as to Mr. Morgan and hence, his affirmative defense fails. (CP 757). Appellant argues that the facts presented to the trial court established that Mr. Morgan's conduct in all respects was intentional and deliberate, not negligent.

On the contrary, that is not what the trial court indicated after analyzing the *Chaussee* factors. Specifically, the trial court determined given the substantial evidence in the record that Moran was in error in his assessment that the plaintiffs were trespassers. (CP 757). The trial court also indicated that plaintiffs' liability theory sound, the facts are inflammatory. (CP 756). The releasing parties' liability theory is sound. (CP 756). The court went on to rule that: "negligence-based causes of action have a three-year statute of limitation and are not time barred here. (CP 759-760). This means that the court ruled that Mr. Morgan was negligent in his judgment/assessment of the situation and his conduct thereafter by wrongfully detaining Mr. Justus is subject to a three year statute of limitations applies.

3. *The facts of his case does support the imposition of liability based on negligence.*

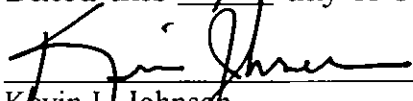
As discussed above, after analyzing the *Chaussee* factors with the substantial evidence in the record, the court determined that Mr. Morgan was in error when the

thought he could make a citizen's arrest. (CP 757). That error in judgment constitutes negligence.

V. Conclusion

The trial court's determination that Mr. Justus' settlement with the Morgans' had a reasonable settlement value of \$818,900 was made on sound legal theories and agreed to by the Appellant. (CP 768). A somewhat unique feature of the proposed settlement between defendant and each plaintiff finds that Court in the role of specifying what amount is reasonable between the respective parties. The interjection of this discretion with the court suitably protects the interest of all of the parties including the Intervenor State Farm. (Pg. CP 764-765). The substantial evidence in the case dictates that this court should affirm the reasonableness of the settlement.

Dated this 4 day of September 2015.



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE FARM FIRE AND CASUALTY
COMPANY, an Illinois corporation,

Respondent,

V.

CORRINE M. TOBECK, as personal
representative of the Estate of
JOESPH: JOEY" EMERY TOBECK,;
ROBERT CHARLES JUSTUS

Respondent.

Case No.: 47196-5-II

**CERTIFICATE OF
SERVICE**

I hereby certify under penalty of perjury under laws of the state of Washington that that on September 4, 2015, I caused to be electronically served the Respondents' Responsive brief to the parties below:

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Dated this 4 day of September 2015



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